COLE, RAYWID & BRAVERMAN, L.L.P.
ATTORNEYS AT LAW
1919 PENNSYLVANIA AVENUE, N.W., SUITE 200
WASHINGTON, D.C. 20006-3458
TELEPHONE (202) 659-9750
FAX (202) 452-0067
WWW.CRBLAW.COM

CHRISTOPHER A. FEDELI
DIRECT DIAL
(202) 828-9874
CFEDELI@CRBLAW.COM

LOS ANGELES OFFICE
2381 ROSECRANS AVENUE, SUITE 110
EL SEGUNDO, CALIFORNIA 90245-4290
TELEPHONE (310) 643-7999
FAX (310) 643-7997

March 21, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex-Parte Presentation in RM-11303

Dear Ms. Dortch:

John D. Seiver and undersigned counsel recently met with Jeremy Miller and Jon Reel of the Wireline Competition Bureau on behalf of the Florida Cable & Telecommunications Association, the Cable Television Association of Georgia, the South Carolina Cable Association, the California Cable & Telecommunications Association, the Alabama Cable Telecommunications Association, and the Cable Telecommunications Association of Maryland, Delaware, and the District of Columbia ("Joint Cable Operators"). The purpose of this meeting was to demonstrate why the Commission should either consider adopting additional regulations or clarify that pole capacity is insufficient under Section 224(f)(2) and 1.1403(a) of the Commission's rules only when space for new attachments cannot be made through reasonable make-ready construction by way of pole change-outs and line rearrangements. This letter explains issues discussed concerning the need for such a ruling.

Section 224 of the Communications Act grants cable operators and telecommunications carriers certain rights to attach their facilities to utility poles, a provision deemed necessary because poles are essential facilities and communications carriers are generally prohibited from building their own pole infrastructure where poles have already been placed. In the course of deploying or modifying their facilities, cable operators will occasionally request or need access to a pole which has no immediately available space for new attachments unless existing facilities on the pole are rearranged or the pole is changed out, a process known as "make-ready." In such situations, typically the cable operator requesting or needing access will pay the utility to make space available by covering 100% of the costs of a new, taller pole and paying for the pole's installation, or by paying to rearrange existing wires to make existing space available consistent with pole engineering and safety requirements. This procedure allows cable operators to attach their facilities at no cost to the utilities and with a net benefit to the utilities, as they assume title to the new pole (which was paid for entirely by the attacher) and may then charge rent to the attacher as well as any new or existing third party attacher with attachments on the new pre-paid pole. Such acts of making capacity available include efforts to replace poles with taller or stronger ones able to carry more facilities, to rearrange existing wires and other equipment on a

pole to make space available, or to take other reasonable make-ready steps to accommodate attachers wherever it is reasonably technically possible to do so.

However, despite this existing practice and contractual provisions regarding make-ready, section 224(f) allows "utilities providing electric service" to deny attachers access to poles when there is "insufficient capacity." Certain electric utilities have begun to insist on the right to deny access for a variety of reasons even when capacity is readily available through reasonable make-ready. Specifically, the Commission's rule on access was challenged by a group of electric utilities in *Southern Company v. FCC.* [1] In *Southern Company*, the 11th Circuit held that the Commission's regulations requiring electric utilities to "expand" capacity were overbroad in light of the statutory language in Section 224(f) of the Act and vacated the rule.[2] However, the court also found that electric utilities may not make a unilateral determination that capacity is insufficient for third-party attachments.[3] Specifically, the court explained that electric utilities do not have "unfettered discretion" to determine insufficient capacity because that could only be found as to a particular pole "*when it is agreed* that capacity is insufficient."[4] Thus, only where a third-party attacher agrees that a taller pole, rearrangement, or other make-ready is not feasible could capacity be deemed "insufficient" to justify a denial of access.

The court reached its conclusions because it found the meaning of "insufficient capacity" to be ambiguous.[5] The court found that "[w]hen it is agreed that capacity is insufficient, there is no obligation to provide third parties with access..." which requires both the pole owner and the attacher to agree that capacity is insufficient before a utility may deny access.[6] In this

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[1] *Southern Company, et al. v. Federal Communications Commission,* 293 F.3d 1338, (11th Cir. 2002) ("*Southern Company*").

[2] *Southern Company,* 293 F.3d at 1347-49. It is noteworthy that under § 224(f), telephone utility pole owners do not enjoy the same right to deny access for insufficient capacity, as the language of 224(f) only grants this exception to "utilities providing electric service". The fact that telephone utilities may not deny access for reasons of perceived "insufficient capacity" suggests that Congress understood the potential for anticompetitive pole attachment practices between competing providers of communications services. Electric utilities providing an unregulated information service – such as BPL – in competition with cable operators will be given the same incentive to deny pole access to competitors.

[3] *Id.*

[4] *Id.* at 1347 (emphasis added).

[5] *Southern Company,* 293 F.3d at 1348-49. In fact, the Court emphasized that the Act does not define the statutory term "insufficient capacity" and does not describe the conditions that would indicate when capacity is insufficient. *Id.* The Court further explained that the statute "is silent on the scope and parameters of the term 'insufficient capacity...'" and accorded Chevron deference to the Commission's reasonable interpretation regarding reservation of pole space to fill the "gap in the statutory scheme." *Id.*

[6] *Southern Company at* 1347-49.

respect, *Southern Company* affirmed the prior Commission decision to reject the electric utilities' arguments that Section 224(f)(2) entrusted them with "unfettered discretion" to determine "insufficient capacity," noting that this interpretation bears no support in the Act.[7]

The Joint Cable Operators' position is that the *Southern Company* language requiring agreement on insufficient capacity is meant to protect cable operators and telecommunications carriers from discriminatory and anti-competitive treatment by utilities, which otherwise could plead "insufficient capacity" as an excuse to refuse to perform make-ready and unreasonably deny attachers access to their poles. Additional regulations or language in Section 1.1403(a) of the Commission's rules should be adopted, or the in the context of any ruling on the petition a clarification should be issued, that the term "capacity" refers not only to capacity on installed poles but all capacity at the disposal of the utility, through reasonable make-ready, at the time of the request for attachment would be consistent with the *Southern Company* decision. The Commission has ample authority to fill in gaps in the statutory framework, particularly given the finding in *Southern Company* that the term "insufficient capacity" is ambiguous.[8]

The cable industry has a legitimate cause for concern that electric utilities deploying BPL and other communications services will engage in anticompetitive practices in dealing with parties seeking to attach wire facilities to utility owned poles pursuant to Section 224. Electric utilities are already refusing to agree to contract language on change-outs or rearrangements on the grounds that federal pole attachment law permits them to deny access when they say a pole has "insufficient capacity" for another attacher, regardless of the circumstances surrounding the condition of the pole.[9] Without the ability to attach their facilities to poles by means of reasonable make-ready, cable operators can not be assured of the ability to comply with franchise, business and competitive needs to serve customers in new areas, replace or upgrade existing facilities, or carry on their business in a competitive market.

The Joint Cable Operators do not suggest that make-ready should be done at the expense of the utility but at the expense of the attacher when the need for make-ready is reasonably attributed to the needs of the new, modified or upgraded attachment, consistent with 47 U.S.C. § 224(i). Otherwise, electric utilities will be able to deny access to their competitors while at the same time telling existing attachers on newly defined "full capacity" poles that existing attachers

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[7] *Id.*

[8] *See Supra*, n.5; *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984) ("*Chevron*"). *Chevron's* first step requires a court to determine whether Congress has spoken unambiguously "to the precise question at issue." *Id. at 842.* If the language of the statute is unambiguous no further inquiry is necessary. *Id. at 842-43.* If the court determines that Congress's intent is ambiguous, the court moves to the second step of the *Chevron* test and asks whether the agency's interpretation of congressional intent is reasonable. *Id. at 844.* Courts must defer to an agency's reasonable interpretation of congressional intent. *Id. at 844-45.*

[9] *See* Joint Report, *Cable Television Association of Georgia v. Georgia Power*, File No. PA 01-002, p. 11-13 (filed October 11, 2005).

must pay a "just compensation" rental which they calculate to be substantially more than the federal formula allows. As the As the *Alabama Power v. FCC* [10] decision explained, for both poles with available capacity and those without, if a buyer of space is not "waiting in the wings," the FCC's cable formula (which provides much more than marginal costs) provides more than any constitutionally required "just compensation" for the existing attachments. However, where an electric utility can show that a specific "opportunity" has been "lost" on a specific full capacity pole (and the *Alabama Power* court did not define "full capacity") an electric utility is entitled to recover something more than its marginal costs (although not necessarily more than the cable formula). Given this situation, electric utilities have an incentive to deny access even where reasonable make-ready could accommodate a new attachment, as an access denial would allow the utility to exploit the difference between the cost of the attacher "going around" the full capacity pole by burying lines underground at great expense and the cost of attaching to its poles at an exorbitant rate only slightly lower than undegrounding, a reward to the utility for the "value" to the excluded attacher rather than the real cost shortfall that would be the subject of the "loss to the owner" standard of just compensation law.[11] Without a clarification of the meaning of "insufficient capacity," pole owning BPL providers could be in a position to deny access to poles as a means of both raising costs to competitors and increasing revenues to themselves.

Utilities routinely set new poles or rearrange facilities to accommodate their own facilities when necessary and should not be allowed to refuse an attaching party's request for additional capacity when that party is willing to bear all costs of make-ready and when the utility has taller poles in its inventory. Accordingly, the Commission should adopt regulations clarifying that the term "capacity" under Section 224(f)(2) and 1.1403(a) of the Commission's rules refers to all pole capacity available to a utility whether installed in the distribution chain, in inventory or available through reasonable make-ready to ensure that any denial of access is not discriminatory or anti-competitive.

Please let me know if you have any questions.

Sincerely,

/s/ Christopher A. Fedeli

Christopher A. Fedeli

cc: Jeremy Miller
Jon Reel

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[10] *Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002) ("*Alabama Power*").

[11] *Alabama Power*, 311 F.3d at 1369-70.